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Supreme Court, U.S.
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No. 89-1188

IN THE
Supreme Court of the United States
February Term, 1990

JAMES C. KELLY
Petitioner,

v.

S. RAY GILL, ETC., *et al.*
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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STATEMENT OF THE CASE

Petitioner filed this action against Respondent Gill in his official capacity only as State Attorney for the Fifth Judicial Circuit. He also filed against the Office of the State Attorney for the Fifth Judicial Circuit. Summary judgment was granted in Respondents' favor as to all counts except one, Petitioner's claim for injunctive relief pursuant to § 112.534, Fla. Stat. Petitioner's other counts were a claim filed pursuant to 42 U.S.C. § 1983, a claim for wrongful termination, and a claim for attorney's fees pursuant to § 57.105, Fla. Stat.

Petitioner filed an appeal to the Fifth District Court of Appeal. Respondents cross appealed. Petitioner, in his reply brief to the appellate court, admitted that sovereign immunity barred his claim filed pursuant to 42 U.S.C § 1983. Thus, the appellate court did not rule on the issue of sovereign immunity. Petitioner argued instead that § 112.532, Fla. Stat., created a property interest in continued employment and that he was denied due process based on a wrongful termination theory.

The appellate court held on June 15, 1989, that absent a statute creating a property interest in employment or contract of employment for a specific duration employment is terminable at will. The court ruled that Petitioner had no employment contract and that there is no common law tort action for wrongful termination cognizable in Florida courts. (J.A. pp. 4-6).

The court further ruled that:

> In the instant case, Kelly has shown no express or implied contract which would remove this factual situation from the "at will" doctrine and contrary to what is alleged on appeal, an individual cannot be wrongfully discharged under an at will doctrine

> solely because that individual was denied some limited statutory procedural right (i.e. § 112.532(4), Fla. Stat. (1985)). A statute cannot create a property interest unless it lists the specific grounds for discharge or states that an employee can only be dismissed for just cause. *Ragucci v. City of Plantation*, 407 So.2d 932 (Fla. 4th DCA 1981). A statutory provision that requires minimal procedural steps prior to termination will not in and of itself create a property interest in continued employment. *Zeigler v. Jackson*, 716 F.2d 847 (11th Cir. 1983). Even assuming that section 112.532(4) affords a law enforcement officer procedural rights, these "reasons" do not invoke the requirement of "just cause" or the requirement of specific grounds for termination. (J.A. pp 5-6).

The court went on to rule that:

> While it is at least arguable that section 112.532(4) offers at least de minimis procedural rights to a "law enforcement officer," Kelly cannot claim a statutory violation because the benefits of section 112.531, et seq., as they relate to dismissal are not available to him. (J.A. p. 7).

The court opined that the fact that Petitioner was called a "law enforcement officer" under § 27.255(1), Fla. Stat., does not mean that he is a law enforcement officer under § 112.531, Fla. Stat.

Petitioner sought review in the Florida Supreme Court on July 19, 1989. This request was denied on October 24, 1989. (J.A. p. 20). Petitioner then filed a petition for relief with this Court.

SUMMARY OF ARGUMENT

Petitioner admitted in his reply brief that sovereign immunity barred his claim under 42 U.S.C. § 1983. This issue was abandoned by Petitioner and was not considered by the appellate court. To fully comply with the Florida appellate procedure an individual must expressly present his contention of error to the appellate court. Either a failure to object or acquiescence in a matter forecloses review in a state appellate court. *Baker v. Baker*, 394 So.2d 465 (Fla. 4th DCA 1981); *Foley v. State ex rel. Gordon*, 50 So.2d 179 (Fla. 1951). Failure of a petitioner to follow the state appellate process on an issue precludes consideration by this Court of that issue.

In addition, this Court held in *Will v. Michigan Dept. of State Police*, 491 U.S. ____, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), that states and their officials, when sued in their official capacities, are not persons pursuant to 42 U.S.C. § 1983. Also, the Florida Supreme Court has recently held that sovereign immunity bars suits filed in state courts against the state and its officials in their official capacities pursuant to 42 U.S.C. § 1983. *Hill v. Dept of Corrections*, 513 So.2d 129 (Fla. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988). The court, relying on the federal court rulings, held that the state had not waived its sovereign immunity by implementing § 768.28, Fla. Stat. Absent express language to the contrary or a specific abrogation by Congress, states are considered to be sovereignly immune to suit in their state courts. This argument is also true for the language of § § 112.532 and 943.139, Fla. Stats., which Petitioner also claims waived the state's sovereign immunity.

This Court has held that property interests are created and defined by an independent state law source. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). In

determining if a property interest has been created, federal courts have looked to the language of the state statute, ordinance, or rule. *Zeigler v. Jackson*, 716 F.2d 847 (11th Cir. 1983). Absent language listing specific grounds for discharge or stating that termination can only be for just cause, no property interest is created. Sections 112.532 *et seq.*, Fla. Stat., contain no such language and therefore do not create a property interest.

Petitioner did not raise as an issue in the appellate court the trial court's determination that § 943.139, Fla. Stat., creates no property interest. Thus, this argument was waived. The appellate court neither reviewed this statute nor made a ruling regarding its language. (J.A. pp 1-11). As argued previously, Petitioner cannot now seek to have this Court review this statute. In addition, this provision contains no established rules for dismissal or requirement of termination for just cause. (J.A. p. 30). No due process rights were created.

The appellate court in construing § 112.531 *et seq.*, Fla. Stat., held that the statutes were not applicable to Petitioner or his particular claim. This determination was solely a matter of state statutory construction. The construction, or alleged misconstruction, of a state statute is not sufficient to invoke the review powers of this Court. *King v. West Virginia*, 216 U.S. 92, 101 (1910). These matters are the exclusive responsibility of the state courts. *See Speiser v. Randall*, 357 U.S. 513 (1958).

Petitioner presents no argument in his brief to this Court regarding his request for attorney's fees, which he raised in Question 4 of the Questions Presented. In addition, the appellate court did not rule on petitioner's attorney's fee claim. (J.A. pp. 1-11). Petitioner neither presented nor argued that claim before the court. He cannot raise it now.

The decision by the appellate court in this case conflicts neither with federal law nor with the law of the highest court of another state. Further, the issues presented here have been resolved by this Court or previously presented to this Court and need no further resolution.

ARGUMENT

In his first argument, Petitioner states that the Fifth District Court of Appeal for the State of Florida (appellate court) ruled that sovereign immunity barred his claim filed pursuant to 42 U.S.C. § 1983. Petitioner alleges that this ruling violates established federal law and is in conflict with another state court of last resort. Petitioner attempts to support this contention by arguing that Florida has waived its sovereign immunity to suits pursuant to 42 U.S.C. § 1983 by virtue of Florida Statutes §§ 768.28 and 112.532(3). (Petition p. 20) Petitioner goes on to argue that the granting of concurrent jurisdiction to state courts for actions under 42 U.S.C. § 1983 as expressed in *Felder v. Casey*, 487 U.S. ____, 108 S.Ct. 2302, 101 L.Ed.2d 123, (1988), and this Court's finding that the supremacy clause preempts the states from implementing *statutes* which limit liability in all claims, prevent a state from determining whether its sovereign immunity is waived for these claims. (Petition p. 19).

A review of the opinion of the appellate court shows that this was not the ruling of that court. The court does not mention sovereign immunity in its opinion and indeed did not decide the claim on that basis. (J.A. pp. 1-11). Petitioner apparently argues that because the trial court ruled on this issue and the appellate court affirmed its ruling, the appellate court, by implication, also ruled on the issue of sovereign immunity. Appellate courts cannot rule on issues by implication. Pursuant to case law regarding Florida's appellate process, an assignment of error must be specifically

raised in the appellate court or it is waived. *Foley v. State ex rel. Gordon*, 50 So.2d 179 (Fla. 1951). Moreover, Petitioner admitted in his reply brief to the appellate court that sovereign immunity barred a claim filed pursuant to 42 U.S.C. § 1983 against a state official in his official capacity.[1]

Petitioner stated:

> Appellate would agree that the Florida Supreme Court has expressly held the doctrine of sovereign immunity prohibits filing of claims pursuant to 42 U.S.C. § 1983 in state courts. (Reply brief p. 3).

Therefore, this argument was not presented to the appellate court for review and that court made no ruling on it. Petitioner abandoned any argument on this issue. Review of this issue by the appellate court was thus foreclosed. *Baker v. Baker*, 394 So.2d 465 (4th DCA 1981). Failure to follow the proper appellate procedure prevents Petitioner from now seeking to revive this argument and present it to this Court for review. *Beck v. Washington*, 369 U.S. 541, 553 (1962). Petitioner has waived review of this issue by this Court. *See Herndon v. Georgia*, 295 U.S. 441 (1935). However, in order to fully respond to Petitioner's argument on this issue respondents will discuss Petitioner's contention that the appellate court impliedly ruled on the sovereign immunity issue by affirming the trial court's grant of summary judgment.

The issue of the state's waiver or nonwaiver of sovereign immunity need not be considered. This Court has recently determined that states and state officials sued in their official capacities for anything other than prospective injunctive relief are not persons for purposes of suits filed

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1 The clear thrust of the Florida Supreme Court's decision in *Hill v. Dept. of Corrections*, 513 So.2d 129, 133 (Fla. 1987), is that the State of Florida has not waived any immunity for a state agency or for a state officer sued in his official capacity.

pursuant to 42 U.S.C. § 1983 when sued in state court. *Will v. Michigan Dept. of State Police*, 491 U.S. ____, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Petitioner sued respondent Gill only in his official capacity as State Attorney for the Fifth Judicial Circuit of Florida and the Office of the State Attorney. This case is on point with *Will* and that decision is controlling. Petitioner did present a claim for injunctive relief in his complaint which was granted by the trial court and denied by the appellate court. The appellate court's decision regarding this claim was based solely on state law grounds, i.e., the applicability of the state statute to Petitioner and to his particular claim. (J.A. pp. 7-8 and p. 11 fn. 5). This request for injunctive relief was not a part of Petitioner's 42 U.S.C. § 1983 claim but was a separate claim. (Petition p. 7). Petitioner had also requested as relief reinstatement. This relief was not granted by the trial court and this denial of relief was not raised on appeal. It was therefore waived. *Foley, supra.*

Further, the issue of whether the State of Florida has waived its sovereign immunity to suits filed pursuant to 42 U.S.C. § 1983 in its courts because of the limited waiver in § 768.28, Fla. Stat., was previously presented to this Court and certiorari was denied. *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988). The Florida Supreme Court, in *Hill*, held that sovereign immunity was not waived by § 768.28, Fla. Stat. In reaching its decision, the Florida Supreme Court relied on relevant federal case law which held that a waiver of a state's sovereign immunity must be express and cannot be implied. Relying on *Gamble v. Florida Department of Health and Rehabilitative Services*, 779 F.2d 1509 (11th Cir. 1986), the court held that Florida had not waived its immunity to suits pursuant to 42 U.S.C. § 1983 filed in state courts. As with § 768.28, Fla. Stat., § 112.532(3), Fla. Stat., contains no express waiver of sovereign immu-

nity. (J.A. p. 24). Therefore, Petitioner's assertion that this provision waives sovereign immunity must fail.

Petitioner cites *Martinez v. California*, 444 U.S. 277 (1980), and *Felder v. Casey, supra.*, to support his contention that the alleged implied ruling of the appellate court conflicts with established federal law and with the highest court of another state. This reference is inappropriate.

The waiver or nonwaiver of common law sovereign immunity was not the issue in *Martinez*. In *Martinez*, the Court was faced with a challenge to a California statute which granted absolute immunity to a public entity or public employee for any injuries which occurred as a result of the placement of a prisoner on parole. After determining that the statute was constitutional, the Court addressed the statute's application to 42 U.S.C. 1983. The Court held that a *state statute* could not immunize persons acting under color of state law from liability.

In *Felder*, the State of Wisconsin attempted to apply a state notice-of-claim statute to 42 U.S.C. § 1983. The issue again was not one of sovereign immunity. Neither the holding of *Felder* nor the holding of *Martinez* is applicable here. Sovereign immunity is not a protection created by a state statute but is a common law right recognized by this Court. *See Quern v. Jordan*, 440 U.S. 332 (1979); *Will v. Michigan Dept. of State Police*, 491 U.S. ____, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

Finally, Petitioner cites *Howlett v. Rose*, 545 So.2d 1367 (Fla. 1989), *cert. granted*, ____ U.S. ____, 110 S.Ct. 403, 107 L.Ed.2d 369 (1989), to support his claim that certiorari should be granted in this case. *Howlett* can be distinguished from this case because the entities sued were a county school board and the superintendent of the county schools. The question presented for review in *Howlett* is whether a local county school board and its officials, as opposed to a *state*

agency and a *state* official, could claim immunity from suits pursuant to 42 U.S.C. § 1983 because the state had not waived its immunity.

The decision below is therefore not in conflict with federal law or the law of the highest court of another state. Nor do the questions raised present issues of great importance that have not already been addressed by the Court or need further resolution.

In his second argument, petitioner contends that the appellate court's finding that § 112.531 *et seq.*, Fla. Stat., do not create a property interest and thus trigger no due process rights conflicts with federal law and the decision of another state court of last resort.

This Court has stated that property interests are created by an independent source such as a state statute, rule, or ordinance. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also Perry v. Sinderman*, 408 U.S. 593, 601 (1972). In determining whether a particular statute, rule, or ordinance has created a property interest, federal courts have looked to state law and reviewed the language of the statute or ordinance. *Zeigler v. Jackson*, 716 F.2d 847 (11th Cir. 1983), citing *Ogletree v. Chester*, 628 F.2d 1366 (11th Cir. 1982), and *McMillian v. City of Hazelhurst*, 620 F.2d 484 (5th Cir. 1980). In *Zeigler*, a case reviewing the language of a Florida statute, the court held that absent established grounds for dismissal or an indication that dismissal can only be for cause, no property interest is created. *Zeigler*, 716 F.2d at 849. Florida Statutes § 112.531 *et seq.*, contain neither established grounds for dismissal nor a provision allowing dismissal only for just cause. No property interest was created by these statutes. Thus, the ruling of the appellate court does not conflict with federal law. Petitioner cites no cases from other states to support his argument of conflict with other state courts of last resort.

Petitioner does, however, cite *Mesa v. Rodriguiez*, 357 So.2d 711 (Fla. 1978), to support his proposition that § 112.531 *et seq.*, Fla. Stat., create some constitutional due process rights. This was not the issue or the holding in *Mesa*. The court, in *Mesa* was requested only to determine the constitutional validity of § 112.531, *et seq.*, Fla. Stat., and their application. Reliance on this case is inappropriate as it is not relevant to the issue presented here. Further, the Florida Supreme Court, expressly adopting the opinion of the Fourth District Court of Appeal in *Migliore v. City of Lauderhill*, 415 So.2d 62 (4th DCA 1982), held that § 112.531 *et seq.*, Fla. Stat., do not create due process rights. *Migliore v. City of Lauderhill*, 431 So.2d 986 (Fla. 1983).

Petitioner also argues that the language of § 943.139, Fla. Stat., creates a property interest in continued employment. This argument was not presented to the appellate court for review and it issued no opinion thereon. (J.A. pp. 1-11). In addition, the provision contains no just cause language or established grounds for dismissal. (J.A. p. 30). Therefore no property interest is created.

Petitioner's third argument is that the appellate court erred in its construction of § 112.531 *et seq.*, Fla. Stat., and by concluding that these sections were not applicable to him. This determination by the appellate court is exclusively the responsibility of the state courts. *See Speiser v. Randall*, 357 U.S. 513 (1958); *see also Garner v. Louisiana*, 368 U.S. 157, 169 (1961). The construction, or in this case, alleged misconstruction of a state statute by a state court is not sufficient grounds to invoke the certiorari jurisdiction of this Court. *King v. West Virginia*, 216 U.S. 92, 101 (1910).

In his fourth argument, petitioner alleges that the appellate court erred by finding that he was not entitled to attorney fees in the trial court. That issue was not addressed by the appellate court because Petitioner did not raise it.

(J.A. pp. 1-11). As stated previously, Petitioner cannot now raise that issue.

CONCLUSION

The appellate court's decision, on the issue properly presented for its review, is consistent with the laws of this Court and other federal courts in finding that § 112.532 *et seq.*, Fla. Stat., create no property interest which would trigger due process requirements. The remaining questions presented by Petitioner were not properly raised at the appellate court level and cannot now be raised in this Court for review.

Further, the questions presented here have previously been resolved by this Court or other federal courts and need no further resolution. In the absence of decisional conflict, certiorari review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JAMES C. KELLY, *Pro Se*, 10135 W. Sunrise Boulevard, Apartment 101, Plantation, Florida 33322, this 21st day of February, 1990.

/s/
LOUIS F. HUBENER